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15 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
16 IN AND FOR THE COUNTY OF YAVAPAI

17 STATE OF ARIZONA,

18 Plaintiff,

19 vs.

20 STEVEN CARROLL DEMOCKER,

21 Defendant.

) No. P1300CR20081339

) Div. 6

) **DEFENDANT'S BENCH**
) **MEMORANDUM ON JUROR**
) **MISCONDUCT**

) **UNDER SEAL**

22 Steven DeMocker, by and through counsel, hereby respectfully provides this
23 Court with a bench memorandum regarding juror misconduct and suggests that the juror
24 at issue has indicated an inability and unwillingness to abide the Court's clear and
25 repeated admonitions.

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

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JEANNE HICKS, CLERK

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DIVISION 6

1 **I. BACKGROUND**

2 After taking a month to complete the death qualification and selection of
3 18 jurors, opening statements in the case commenced on June 3. On June 17,
4 trial was suspended based on Judge Lindberg's sudden health crisis. Judge
5 Darrow was appointed to the case on July 2. Trial finally resumed on July 21.
6 Two jurors have previously been excused, with 16 jurors remaining. Trial is now
7 expected to last through the end of October.
8

9 On July 30, 2010, the Court received a note from a juror about another
10 juror's conduct. The juror note was made part of the record and states, in part,
11 that the juror at issue has been making continuous unfriendly remarks about the
12 defense and [REDACTED] in particular. The juror note went on to wonder whether
13 the juror at issue could be "objective." On the same date, the juror in question
14 was seen to offer popcorn to one of the prosecutors and the State's case agent
15 during a break.

16 The same juror was questioned previously when it was discovered mid-
17 trial that he had at one time provided [REDACTED] to one of
18 the prosecutors. The same juror is also known to have commented publically in
19 the presence of other jurors about the length one of the State's witnesses was
20 testifying during Mr. Sears' cross examination. Finally, the bailiff notes that this
21 juror has been known to attempt communication with court security officers and
22 others during breaks.

23 After receiving the juror note, the Court held an under seal, in chambers
24 proceeding with the juror in question in the presence of counsel. The juror
25 commented on the slow pace of the process and the repetition of photographs.
26 He revealed that he had shown a question he prepared to another juror to get the
27 other juror's opinion. When questioned about these issues he responded, rather
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1 dismissively, that he was "sorry about the popcorn." He also indicated that he
2 had spoken to his wife about the case, although he denied that this contact
3 involved details of the case. The juror also denied, in response to questions from
4 the Court, any behavior that would cause either side to question whether he had
5 prejudged the case.

6 After the in chambers meeting, the defense requested that the juror be
7 removed based on his cumulative conduct and on his seeming inability to
8 understand and follow the Court's repeated admonitions to avoid prejudging the
9 case and to avoid discussing the case, the lawyers or the parties with other jurors.
10 The Court indicated that it too believed that the juror may not fully appreciate
11 and understand the admonitions, and that the pattern of his misconduct was
12 troubling. The State first offered no opinion but later objected to removal of the
13 juror in question. The parties discussed the possibility of discussions with the
14 juror who authored the note.

15 **II. JUROR MISCONDUCT**

16 It is undisputed that a criminal defendant is entitled to be tried by an impartial
17 jury. U.S. Const. amends. VI, XIV; *Turner v. State of Louisiana*, 379 U.S. 466, 471-72,
18 85 S.Ct. 546, 549, 13 L.Ed.2d 424 (1965). "The requirement that a jury's verdict 'must
19 be based upon the evidence developed at the trial' goes to the fundamental integrity of
20 all that is embraced in the constitutional concept of trial by jury." *Id.* at 472, 85 S.Ct. at
21 549 (quoting *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751
22 (1961)). Arizona Rule of Criminal Procedure 19.4 provides that Arizona courts are
23 required to "admonish the jurors not to converse *among themselves or with anyone else*
24 *on any subject connected with the trial....* until the action is finally submitted to them."
25 (emphasis added).
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1 Also, under the Arizona Rules of Criminal Procedure 18.4(b), “[w]hen there is
2 reasonable ground to believe that a juror cannot render a fair and impartial verdict, the
3 court, on its own initiative, or on motion of any party, shall excuse him from service in
4 the case. A challenge for cause may be made at any time... .” When an issue of
5 potential juror misconduct arises, “the court’s response should be ‘commensurate with
6 the severity of the threat posed.’ ” *State v Miller*, 178 Ariz. 555, 557, 875 P.2d 788, 790
7 (1994) (quoting *United States v. Thomas*, 463 F.2d 1061, 1063 (7th Cir.1972)).

8 Arizona courts have held that where a juror makes clear that she or he
9 cannot follow the court’s clear admonitions, even where the failure to follow the
10 admonitions may appear to be “innocuous,” dismissal is appropriate. See e.g.
11 *State v. Cook*, 170 Ariz. 40, 53-54 (1991). In *Cook*, the Court held that dismissal
12 of a juror was proper where the juror admitted discussing the case with her co-
13 workers although her own description of the discussion was “innocuous.” The
14 Court noted that based on her failure to follow the court’s admonition, it was
15 reasonable for the trial judge to determine that the juror’s ability to render a fair
16 and impartial verdict had become suspect. She admitted to the judge that she had
17 commented on the trial with her co-workers despite the judge’s clear admonitions
18 not to discuss the case with outsiders. “The trial court had evidence of specific
19 violations of its admonitions to the jurors. These violations went beyond casual
20 utterances regarding, for example, the length of the trial or similar matters, but
21 instead concerned the conduct of witnesses and the content of specific exhibits.
22 The court did not abuse its discretion in determining that there was cause to
23 strike the juror for violation of its admonition.” *Id.*

24 In this case, the evidence is that the juror in question has commented
25 negatively to other jurors on more than one occasion (i.e. “continuous”) about the
26 defense and defense counsel [REDACTED]. This is a specific instance of violating a
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1 particular admonition. The juror also admitted showing a written question to
2 another juror, which is also a specific example of failure to abide the Court's
3 admonition by discussing the case with another juror. The juror also commented
4 in front of other jurors about the length of cross examination of one of the State's
5 witnesses. Finally, the juror communicated, albeit innocuously, with one of the
6 prosecutors and the State's case agent. While each of these instances of violation
7 of the Court's admonitions may be individually inoffensive, taken collectively
8 there is no choice but to conclude that the juror is unable and unwilling to follow
9 this Court's clear and repeated admonitions, and that he poses a real risk to the
10 Defendant's right to a fair trial by an impartial jury.

11 Determining whether there are reasonable grounds to believe that a juror
12 cannot render a fair and impartial verdict is within the discretion of the trial
13 judge. Only the trial judge has the opportunity to observe the juror's demeanor
14 and the tenor of his or her answers first hand. Consequently, a trial court will not
15 be reversed absent an abuse of discretion. *State v. Cook*, 170 Ariz. at 54 citing
16 *State v. Chaney*, 141 Ariz. 295, 303, 686 P.2d 1265, 1273 (1984).

17 The threat posed by this juror's cumulative repeated misconduct is severe
18 enough to warrant his excusal at this time. Given the number and severity of his
19 violations of the Court's admonition, his excusal is the commensurate response
20 contemplated by the *Miller* court's directive that "the court's response should be
21 'commensurate with the severity of the threat posed.'" *State v Miller*, 178 Ariz.
22 at 557, 875 P.2d at 790.

23 Possibly the most disturbing aspect of this juror's admitted conduct has
24 been his inability to avoid forming and expressing opinions before he has heard
25 all the evidence. This Court is well aware that Arizona re-examined its rules on
26 "pre-deliberation" juror-to-juror communications several years ago. After a
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1 lengthy debate involving the Supreme Court, the State Bar and both civil and
2 criminal law practitioners, the decision was made to change the *civil* rule to allow
3 jurors to communicate prior to the close of the evidence. A very deliberate and
4 carefully considered decision was made at the same time to ratify and keep in
5 place the rule against pre-deliberation juror communications in *criminal* cases.
6 That determination leads to the strong words contained in the admonition given
7 in this case so often, as it is in all criminal cases. Arizona has stuck closely to
8 this rule because of the obvious bias that arises when jurors are allowed to form
9 their opinions long before the defense even begins to put on its case. Primacy
10 has its intended impact; jurors cease even trying to suspend judgment; they begin
11 to behave like guests on a game show seeking the rewards of deciding quickly
12 and then expressing their improperly formed opinions to anyone who will listen,

13 Not all jurors will do what Juror [REDACTED] has done. But those who resist are
14 likely to be polarized against the offending juror. We are already seeing that
15 happen. We have three more months for all of these very predictable traits of
16 human nature to take root unless the Court acts now to remove this Juror and to
17 re-explain the importance of adherence to the admonition.

18 CONCLUSION

19 The cumulative conduct of the juror in question makes clear his inability to
20 appreciate and abide by the Court's admonitions. Excusing the juror is well within the
21 Court's discretion.

22 DATED this 2^d day of August, 2010.

23
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ORIGINAL of the foregoing hand delivered for
filing this 2d day of August, 2010, with:

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COPIES of the foregoing hand delivered this
this 2d day of August, 2010, to:

The Hon. Warren R. Darrow
Judge Pro Tem B
120 S. Cortez
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Prescott Courthouse basket



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